Hughes Properties, Inc. d/b/a Harolds Club *and* Professional Association of Gaming Employees. Case 32-CA-4235

12 September 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 29 November 1982 Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent did not violate Section 8(a)(1) of the Act by prohibiting solicitation of off-duty employees by off-duty employee Fisher in Respondent's Gazebo Bar. We disagree.

The facts are fully set forth by the Administrative Law Judge. In brief, Respondent maintains a gaming casino which employs approximately 1,300 people of whom 250 are gaming employees. In October 1981, games dealer Fisher assisted in founding the Professional Association of Gaming Employees (PAGE). On 10 January 1982 Fisher appeared at the casino on his off-shift time shortly before the daytime gaming employees concluded their shift. Fisher went to the Gazebo Bar, a public lounge adjacent to the casino floor. He sat at a table with his back to the games area and talked for about 20 to 25 minutes with six off-shift dealers. He promoted PAGE to them and eventually passed around authorization cards and a petition. Respondent's head floor manager then came over and said that Fisher must stop his activity or leave. Fisher and the manager discussed the issue briefly and quietly, and then Fisher left.

As stated above, the Gazebo Bar is adjacent to the casino floor but elevated two steps above it. The closest bar table is about 10 feet from the closest gaming table. Cocktail employees wait on customers in the bar and on gaming customers on the casino floor. It is a violation of house rules for any gaming employee to be in the bar while on duty. However, Respondent encourages employees to go there after their shifts by, *inter alia*, giving them free drink tokens for the bar.

In *Marshall Field & Co.*, 98 NLRB 88 (1952), the Board held that it would not find that a public restaurant in a department store was a sales area within which the respondent could prohibit employees from engaging in union solicitation. The Board elaborated on this principle more recently in *Ameron Automotive Centers*, 265 NLRB 244 (1982), again involving a public restaurant within a retail store. In that case the Board found that union solicitation could not be prohibited in the restaurant provided that it was conducted in a manner consistent with the purpose of the restaurant.[2]

Here, Respondent's Gazebo Bar is open to the general public. And there is no evidence that Respondent has ever limited the access of off-shift employees to its public facilities. Indeed, the evidence that Respondent gives free drink tokens to employees indicates that it has encouraged such access. Moreover, Respondent has not shown that Fisher's use of the bar on 10 January 1982 was in any significantly discernible way distinguishable from the customary use of that facility. In this regard, we note that Fisher's conduct was not shown to have been disruptive in any way, and that he did not move from table to table or interfere with on-duty employees in the vicinity.

In light of the above, we conclude that Respondent violated Section 8(a)(1) of the Act by prohibiting employee Fisher's union solicitation in its Gazebo Bar on 10 January 1982.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hughes Properties, Inc. d/b/a Harolds Club, Reno, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Prohibiting union solicitation by off-shift employees in its public bar insofar as such solicitation is conducted in a nondisruptive manner consistent with the customary use of that facility.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Member Hunter noted in his partial dissent in *Ameron, supra*, that to the extent that union solicitation alone is prohibited, respondent there discriminated on the basis of union activity. He relied additionally on the fact that Woolco ordinarily permitted its off-duty store employees to take their meals or breaks on the restaurant premises.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at its facility in Reno, Nevada, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT prohibit off-shift employees from soliciting other off-shift employees on behalf of the Professional Association of Gaming Employees in our public bar so long as such solicitation is conducted in a nondisruptive manner consistent with the customary use of that facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

HUGHES PROPERTIES, INC. D/B/A
HAROLDS CLUB

DECISION

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Reno, Nevada, on September 15, 1982, based on a complaint alleging that Hughes Properties, Inc. d/b/a Harolds Club, herein called Respondent, violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing a rule forbidding its off-duty employee/invitees from engaging in any solicitation/-discussion concerning union and other protected concerted activities with fellow off-duty employee/invitees in the public lounges of its facility.

Based on the entire record,[1] my observation of witnesses, and consideration of post-hearing briefs, I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

Gary Fisher has been employed by Respondent as a games dealer for about 3-1/2 years, and during October 1981 assisted the founding of Professional Association of Gaming Employees (PAGE) in which he now holds office as executive codirector.[2] Of an estimated 1,300 persons working in the two buildings comprising this casino, Fisher estimated that 250 were engaged in running pit games. All have break periods during their work shift as illustrated by the fact that there are four dealers for each three tables offering the game of 21 (blackjack), allowing one to relieve as each person reached their 20-minute breaktime following an hour on duty.

On October 13, 1981, Fisher undertook to circulate PAGE flyers in the break room as employees came and went. In the process of doing this he handed one to Games Department Manager Jerry Sickma, and ultimately left about a dozen on a table. When this stack was down to only one it was picked up by Pit Supervisor Del Hoover, and because of her management capacity Fisher asked her to leave it. He testified that she declined, and kept the flyer saying she had been "sent down" to pick them up.

The essential episode of this litigation occurred at the Gazebo Bar on January 10, 1982. This is a public lounge adjacent to the casino floor, and raised two steps above the surrounding elevation. Casino customers wishing to drink may use floor-mounted stools at the bar, or a table from among the approximate dozen spaced around the primary raised floor area. At the closest point of bar to table, 4 feet separates the two appointments, while the nearby roulette table and 21 table groupings are positioned about 10 feet from the closest table of the Gazebo Bar. The actual bar is designed for a conveniently separate, small area where glasses are returned, and a narrow dispensing area where cocktail serving employees pick

[1] Errors in the transcript have been noted and corrected.

[2] Respondent is a domestic corporation with an office and place of business in Reno, Nevada, where it is engaged in operating a gaming casino, annually deriving gross revenues in excess of $500,000 while purchasing and receiving goods or services valued in excess of $50,000 orginated outside Nevada. On these admitted facts I find Respondent to be an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and otherwise that PAGE, sometimes called the Union, is a labor organization within the meaning of Sec. 2(5).

up drink orders. As traditionally so for the industry, it is a violation of house rules for any gaming employee to be in this public area while on duty.

Fisher testified that on January 10, 1982, he appeared at the casino on his own off-duty time at or about 6:50 p.m., shortly before daytime pit game employees would end their shift at 7 p.m. He carried an NLRB election petition form, an NLRB informational pamphlet, and 4- by 6-inch slips of paper constituting representation authorizations to PAGE when appropriately signed by employees. At this point in time Respondent's written no-solicitation/distribution rule provided:

> No person who is not an employee of Harolds Club is permitted to solicit our employees or distribute literature or sell merchandise to our employees in our buildings or on our property at any time. The purposes of this rule are to prevent employees from any disruptions or impositions which possibly would be created by such activities and to maintain our operations at peak efficiency at all times for the benefit of our guests.
>
> For similar reasons, no employee of Harolds Club is allowed to solicit during working time or sell merchandise at any time on our property or distribute literature (1) during working time or (2) at any time in areas of our buildings which are open to the public.
>
> For purposes of this rule, "actual working time" means time employees should be performing jobs and not breaktime, lunchtime or time immediately before and after the shift.

Fisher sat at a table most near the bar, choosing the chair that positioned him with his back to the bar and to the games area. In the course of 20–25 minutes, about six dealers from the shift just ended sat or gathered at this table as Fisher promoted PAGE to them. He testified to intending that no documents leave the table, and particularly that any authorization slips, once read and signed, be returned to him. The episode was then interrupted by William Parga, a head floor manager acting as casino supervisor for that night, who appeared saying the activity must be stopped or that Fisher must leave. The right to continue was debated civilly between Fisher and Parga for a short time, after which Fisher gathered up all material and left. Parga's version is that about one-half hour elapsed between the time he first saw Fisher on the casino floor until he approached the table where the authorization slips were seemingly in the process of random solicitation among employees in violation of the existing rule as it would apply to a "work area."

On January 15, 1982, Personnel Director Max Page met Fisher at his office where an approximate 1-hour conversation ensued, during which time John Thomas, a PAGE strategist and former supporter of the National Maritime Union (NMU) in previous representational efforts, was also present. Fisher testified that the unfair labor practice charge upon which this proceeding is based had been drafted at that point in time, and he guilelessly showed it to Page as a point of departure for discussion. This led in turn to far-ranging remarks on the philosophy of labor-management relations, expression of gratitude by Page for the openness that Fisher displayed, and ultimate reaffirmation of the employer's rule against activity of the type manifested 5 days earlier, or even the offered alternative of modestly scheduling PAGE representatives into the employee break room on their own off-duty time.

On these facts the General Counsel contends that Respondent has misperceived its powers, and unlawfully impaired employee rights of solicitation under the guise of enforcing an otherwise valid rule. Further, it is argued that Respondent has offered no "cognizable" business justification for the interdiction made by Parga, and confirmed by Page, as "special circumstances" regarding production or discipline within the intendment of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The General Counsel emphasizes that gaming employees were, to the extent possible, deliberately kept from line of sight when Fisher was engaging in union activities at the Gazebo Bar table, while there was absolutely no disturbance to business operations nor any drift into boisterousness as would impinge on principles of *May Department Stores*, 59 NLRB 976 (1944), or *Marshall Field & Co.*, 98 NLRB 88 (1951). Additionally, the General Counsel contends that alternate means of employee contact are so inadequate that the balancing considerations of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), require freedom of gaming employees to associate for self-organizational purposes in areas such as this public lounge, providing they are off-duty while so doing.

Respondent points to the facial validity of its rule as promulgated for what is essentially a retail service enterprise, and disputes the applicability of *Babcock & Wilcox* because that case arose in an industrial setting. Respondent argues alternatively that the Union had held itself out as interested in a broadly based unit of employees[3] and is identified with the NMU's presence in early 1980 when an election petition resulted in a Stipulation for Certification Upon Consent Election in a unit of more than gaming department employees, asserting from this that the Gazebo Bar was therefore a situs of work in terms of employee solicitation taking place.

Long-established doctrine in this subject area of the law involving determination of whether Section 7 activity may be exercised on private property requires a balancing of the legitimate interests of employees to exercise protected rights with the legitimate managerial and property interests of the employer. *Republic Aviation, supra; Babcock & Wilcox, supra; Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972). As written in *Hudgens v. NLRB*, 424 U.S. 507 (1976), quoting *Babcock & Wilcox, supra* at 112, the basic objective of the Act [is] the accommodation of Section 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The United States Supreme Court has stressed that the Board is to avoid "mechanical answers" in seeking a "solution of this non-

[3] In December 1981, Thomas had distributed a flyer urging employee attendance at an organizational meeting of PAGE. Graphics of this flyer were such that its attention-getting capacity would have extended to "dealers [and] writers" as well as "gaming employees."

mechanical, complex problem in labor-management relations,"[4] and from this the Board has recognized that "the formulation of generalized rules in this area must be undertaken with caution because . . . differing fact situations call for different accommodations."[5] In accommodating the relevant interests in each factual setting, the Board has given varying weight in protected activity with the owner of the property,[6] the nature of the employer's operations,[7] the nature or type of protected activity involved,[8] the location on the property of the exercise of the activity,[9] the right of the individual to be on the employer's property exclusive of rights under the Act,[10] and the impact of the protected activity on production, discipline, and plant cleanliness.[11]

The balancing test was first formulated respecting the right of employees to engage in union solicitation on their employer's premises. *Peyton Packing Co.*, 49 NLRB 828 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730. Because employees are "already rightfully on the employer's property" pursuant to their work relationship, the employer's interest in controlling access to its property was not involved. *Hudgens, supra* at 521, fn. 10. However, the Board recognized that the employees' right under the Act to form, join, or assist unions must be balanced against the employer's managerial concerns relating to production, discipline, and order in the plant. In accommodating these conflicting interests the Board recognized that "working time is for work," holding that an employer could lawfully prohibit union solicitation during what was then labeled "working hours." However, because the work place also is a uniquely convenient location for employees to engage in union organizational activity, the Board also determined that absent special circumstances regarding maintenance of production or discipline, employees have a protected right to engage in union solicitation on their employer's property outside of working hours. *Peyton Packing, supra.*

The location on the employer's property where employee solicitation can occur during nonworking time varies depending on the nature of the employer's operations and the impact solicitation would have on the employer's management of that operation. Thus, in a typical industrial plant, employees on nonworking time may engage in oral solicitation in working as well as nonworking areas. An employer may, however, limit distribution of union literature by employees to nonworking areas of the plant because distribution impacts on plant cleanliness. Thus, the two forms of protected activity do not require an "identical adjustment" of interests.[12] In other settings, different accommodations have been reached. In retail stores, for example, the Board has determined that, in order to avoid undue disturbance of the sales operation, the employer may prohibit employees from engaging in union solicitation at all times on the selling floor. *May Department Stores, supra.* Relatedly the Board has held that special considerations in health care institutions warrant allowing hospitals to ban employee solicitation and distribution, even during nonworking time, in immediate patient care areas and where necessary to maintain patient care or employee discipline. *Beth Israel Hospital v. NLRB, supra.* Summarizingly, the appropriate accommodation of interests in the exercise of Section 7 rights on private property includes consideration of numerous factors, and the "locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context." *Hudgens, supra* at 522.

Marshall Field was a seminal case in flushing out statutory meaning, and was itself decided in context of earlier pioneering via *May Department Stores* and *Goldblatt Bros.*, 77 NLRB 1262 (1948). For present case purposes what may be usefully gleaned from *Marshall Field* is that:[13]

> (a) Prohibition of union solicitation by employee organizers in aisles, corridors, elevators, escalators, and stairways inside this huge, nationally renown department store did not violate the Act, because it "may create safety hazards tending to disrupt and interfere with . . . business to a serious degree," since such conducts of movement "interconnect sales areas" and thus "could directly affect the passage and safety of customers in such areas."
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> (b) Similar prohibition in public restrooms and waiting rooms inside the store was unlawful, because while all components of the building are "inextricably interwoven" with business objectives these particular nonselling areas do not "present the problem peculiar to aisles and other interior store traffic channels" so that solicitation (where reasonabl[y] "restricted") could have ony a slight, if not nonexistent, effect upon public use of such facilities and no adverse effect on sales activities."
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> (c) The employer "practice" of permitting employees to meet in one of the store's public restaurants "by appointment" was lawful, because patrons

[4] *NLRB v. Steelworkers (USW)*, 357 U.S. 357 (1958).

[5] *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962).

[6] *Republic Aviation, supra* (employees); *Tri-County Medical Center*, 222 NLRB 1089 (off-duty employees); *Babcock & Wilcox, supra* (nonemployees).

[7] *May Department Stores, supra*, enfd. as modified 154 F.2d 533 (8th Cir. 1946), cert. denied 329 U.S. 725 (retail stores); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (hospitals).

[8] *Stoddard-Quirk, supra* (comparing oral solicitation and literature distribution during union organizing campaign); *Seattle-First National Bank v. NLRB*, 651 F.2d 1272 (9th Cir. 1980) (picketing in support of economic strike). See also *Giant Food Markets v. NLRB*, 633 F.2d 18 (6th Cir. 1980) (area standards picketing).

[9] *Stoddard-Quirk, supra* (working areas versus nonworking areas); *Marshall Field & Co., supra*, enfd. in part and modified in part 200 F.2d 375 (7th Cir. 1952) (public selling areas distinguished from public nonselling areas).

[10] *Marshall Field, supra; Seattle-First National Bank, supra; Hudgens, supra.*

[11] *Stoddard-Quirk, supra.* See *S & H Grossinger's, Inc.*, 156 NLRB 223 (1965), enfd. 372 F.2d 26 (2d Cir. 1967).

[12] The distinguishing characteristic of literature as contrasted with oral solicitation . . . is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading at his convenience. *Stoddard-Quirk, supra* at 620.

[13] The situations listed below contemplate that both employee organizers and those employees being solicited are off duty at the times involved. Further, I do not treat the rule of *Marshall Field* as it was variously constructed for nonemployee organizers, for that is not involved in the instant case.

> of the restaurant were normally placed at separate tables and this comparative isolation "make[s] remote the possibility of substantial interference with . . . business." In fashioning that principle, the Board assumed that "table to table" circulation was not involved, and that the restaurant employees providing service "are not, and . . . have not been, the subject of solicitation."

A short, instructive opinion was written by Chairman Herzog in partial dissent, arguing that public waiting and restrooms should be within the employer's ambit of governance because whether "physically contiguous to the [sales] counters" or not, they do in any event "contribute to the desired relationship between retailer and customer, whether facilities are provided out of necessity, or for the customer's convenience, or merely to generate goodwill."

The adversarial contentions of the parties here must be further understood in context of their conceptual disagreement as to how this fact situation should be classified. The controversy centers on the possession, display, and discreet circulation of written materials relating to the organizing process. From this fact the General Counsel asserts that this is the routine, expectable use of such materials and compellingly within the intendment of long-evolving doctrine to which the label of "no-solicitation" rule exclusively applies, while Respondent argues that solicitation overlaid with a peculiar type of distributional characteristic is the essence of what occurred. The distinction is more imaginary than real, for what must initially be said about the case is that the permissible extent of regulating on-site organizing activities in a retail enterprise becomes the special point for adjudication. Thus, as both parties urge, *Marshall Field* is the case to look to for controlling guidance. This leads directly to consideration of significance where, as here, the business operation is of a gambling casino with other functions confined to food and beverage purveying. In a case where claimed employee misconduct in connection with a demonstration related to efforts at employee self-organization was involved, the Board alluded to its traditional distinction in applying rules to retail enterprises as contrasted with manufacturing plants. The specific requirement being recognized was "that an atmosphere be maintained in which customers' needs can be effectively attended." *G.T.A. Enterprises*, 260 NLRB 197 (1982). In a separate vein of this case the Board noted that boisterous and disruptive conduct was especially unwarranted "when it occurs at the height of the retailer's serving the needs or wants of its customers."

In terms of the diverse and sweeping notions that concern most no-solicitation rules, this case essentially presents a very narrow issue. It is whether or not what amounted to promulgation of a refined no-solicitation rule by Parga violated the Act. Taking guidance from the holding in *Marshall Field* I conclude that it did not. The nearness of the Gazebo Bar to adjoining gaming tables, and its visual integration with all casino dynamics, constitutes the place at which Fisher carried out his contacts of January 10, 1982, as analogous to the selling area of a retail establishment. The customary activities of on-duty games dealers, and expectable movement of gambling customers among and between the various attractions of chance and the conveniently adjoining imbibery, make the location more like a conventional retail store's passageway than like its more secluded public rooms. This was the precise distinction of *Marshall Field*, and for this industry the aptness is highlighted by the decision in *Barney's Club*, 227 NLRB 414 (1976), in which the employee organizers had no "employees' lounge or rest area" and were instead relegated to a particular reserved table in that establishment's bar when off shift (or "off-duty"). What tends to cloud this situation is that Respondent chose to briefly tolerate Fisher's orderly solicitation of the evening, until a point was reached at which it conflicted with increasingly more pronounced use of the Gazebo Bar by actual customers as a peak evening height of business approached. Fisher's appearance had been monitored from the outset, however, the more significant and uncontradicted fact is that patronage was relatively busy at the time in question and building toward an even more hectic pinnacle as the time approached 8 p.m. of this Sunday night.[14] While Fisher's motivations are not relevant to deciding the case, his testimony must be taken as showing dismay over the limited convenience of the employee break room in terms of organizational objectives, and from this an experiment was tried in terms of attemptedly carving out a portion of the Gazebo Bar for the same use. This is the point at which Respondent resisted, and in the very balancing sense that must apply shows a greater entitlement to keep its retail-type offerings to customers free from an activity that would compete with customer comfort and distract those nearby, on-duty providers of retail service. *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980).

Respondent has argued alternatively that the Union had manifested an object of organizing all employees of the establishment, and management was entitled to rely on such overtness in applying no-solicitation principles. I am satisfied that Respondent is correct on these separate grounds, and thus conclude that a second basis exists to independently find no violation of the Act has been presented on these facts. The situation must be viewed as it existed at the time, and here a credibility resolution is necessary in which I am emphatically persuaded to believe Page as to conversational exchanges of late 1981 between himself and Fisher. I am thus satisfied that when at that point in time Fisher delivered to Page a copy of the Union's prospective constitution, in which "gaming employees" were identified as the group to be covered, he expressly verbalized this term to Page in a manner that was without restriction or limitation to those that might be involved in only games dealing. Fisher's denials on this point are unsatisfactory from a demeanor standpoint, and because of the shifting nature of his testimony when pressed to recall actual remarks to Page. It must also here be remembered that contemporaneously Thomas had issued a flyer in which attention was sought

[14] I place no reliance on the fact that a keno game display center is positioned in the Gazebo Bar, or that on one isolated occurrence a keno writer served an important patron while that person was within the Gazebo Bar itself.

from "gaming employees," which would have been oddly redundant if this term were not to mean something more than only dealers. From this I conclude that the fundamental *Babcock & Wilcox* rule also applies insofar as permitting restriction of solicitation activities with off-duty employees, for on-duty Gazebo Bar serving personnel were moving among the tables. I recognize that the Union has not in fact attempted organizational efforts with such individuals, however, the test of no-solicitation rule validity should be what was reasonably known by an employer in its application of doctrine.

[Recommended Order for dismissal omitted from publication.]